United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-7013

B

PATRICIA A. FAHEY,

PLAINTIFF

V.

NORMAN F. CODO,

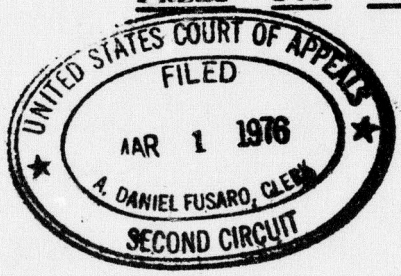
DEFENDANT

SHIRLEY E. FAHEY,

DEFENDANT

APPEAL FROM MEMORANDUM AND ORDER OR JUDGMENT
FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT



PATRICIA A. FAHEY
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BRIEF OF APPEAL

While domiciled in Illinois, Patrick D. Fahey, father of the plaintiff, executed a Will, making his wife, Shirley E. Fahey and an attorney, Norman F. Codo, executors and trustees of his estate, excluding from this estate certain property over which he has power of appointment (Exb. 1, The Will, pg.3, Sec. THIRD:) "I give and devise the residue of my estate, excluding any property over which I have power of appointment, to the said SHIRLEY E. FAHEY and NORMAN F. CODO, as trustees, upon the following terms:" In addition, he nominated his daughter, Patricia A. Fahey also as executor and trustee of his estate or trusts with full power and discretion to be exercised without court order, should the two executors and trustees, Shirley E. Fahey and Norman F. Codo fail or cease to act. (Exb. 1, The Will, pg.7, Sec. FIFTH) "If my wife or Norman Codo fail or cease to act as executors, I name Patricia A. Fahey as executor." (Exb. 1, pg.7, Sec. SIXTH B (7)) "All powers and discretions granted to the trustees under this will." B "I give the executor the following powers and discretions, in each case to be exercisable without court order:".

Within the Will, the decedent establishes also that his daughter, Patricia A. Fahey, shall receive no less than $2,000.00 per month from this trust and from other sources, as quoted (Exb. 1, pg.3, Sec. THIRD: A) "however, that

Patricia A. Fahey shall receive no less than Two Thousand 00/100 ($2,000.00) Dollars per month from this trust and from other sources." The daughter of the deceased resides in the State of New York since the year, 1959, and the executors and trustees are in the State of Illinois. The Will was probated in Illinois on January 21st, 1971, six weeks later than the date of the death of the deceased. The Will was executed three months short of the death of the deceased. When the deceased executed the Will, he requested his daughter to come to Illinois and in her presence and in the presence of himself and in the presence of his secretary, Elda Everson, had the present attorney, Norman F. Codo, one of the present executors and trustees, read the Will. The daughter subsequently returned to New York. Soon afterwards her father died. Since then, during the past five years, the daughter of the decedent was never contacted again nor from the executors and trustees nor from the estate. On numerous occasions during this time, the daughter requested from these executors and trustees an explanation in writing for their silence and attitude and why she had not received her $2,000.00 per month that her father demanded she should receive, but to no avail. Recently, in fact, she sent a representative to Illinois to inquire of the reasons for this persistent silence and nothing could be done. The executors simply refused to discuss the subject avoiding the total issue as if the Will of the deceased never existed.

The executors, subject to personal liability, by not executing the terms of the Will of plaintiff's late father, Patrick D. Fahey, which terms demand monthly financial contact with the plaintiff, who since the year 1959 has resided in the State of New York, have committed a persistent act in the State of Illinois, causing injury to the plaintiff and to her personal property in the State of New York.

Further by avoiding the issue to the pertinent questions under the color of law and by creating conditions of deprivation and oppression to the plaintiff, the defendants have violated plaintiff's civil rights, guaranteed and protected by the Constitution of the United States and Statutes, whereby the common law as modified and changed by the Constitution and Statutes of the State provides for long arm nationwide jurisdiction to carry the same into effect.

The plaintiff sets forth that the defendants have not answered the summons and complaint which was served upon them in Joliet, Illinois on 10/31/75, under the allegation of jurisdiction founded on the existence of a federal question and amount in controversy.

The defendants have sought an order pursuant to Rule 12(b) of the F.R.C.P. dismissing the complaint on the grounds that the Court lacks jurisdiction over the defendants in that said defendants reside in the State of Illinois and that the assets of the estate of Patrick D. Fahey are not in

the State of New York and defendants were not and are not subject to service of process under Rule 4(f) of the F.R.C.P. and that further assertion of in personam jurisdiction would violate the due process requirements, as per Hanson v. Denkla, 357 U.S. 235, 251 (1958). (Appendix G, (k), pg.36)

Contrary to the Hanson v. Denkla case, whereby the opinions of the Supreme Court stated (pg.254; 357 U.S.) "that the issue is not choice of law but the consideration of acts of the trustees", in plaintiff's case, the property over which the deceased has power of appointment are excluded from the residue and remainder of the estate. The forum of the assets in the Hanson v. Denkla case played a major role in the case, when in fact, in plaintiff's case, the forum of the assets constituting the other sources under the Will from which the plaintiff is to receive no less than $2,000.00 per month as of the death of her father, have no forum state since the defendants have not stated where the assets of these properties are located, which properties are considered to be properties over which the decedent has power of appointment and as one of "the other sources".

The defendants claim that they have the right under personam jurisdiction not to answer the complaint, which demanded an explanation in writing for their violation, when in fact the plaintiff has, as per Parargraph FIFTH and SIXTH and Sub. B (7) of the Will, as executor and trustee, all power

and discretion without the necessity of a court order, the right to demand all relevant questions and documents in writing from New York City or elsewhere to said executors and trustees including all involved banks since the instrument of power for the defendants as well as for the plaintiff is the Last Will and Testament of plaintiff's late father, Patrick D. Fahey.

That the traditional notion of fair play and substantial justice quoted by Mr. Justice Black in Hanson versus Denkla case should indeed apply to this case. The defendants for the past five years were privileged by the various income from the various assets under their payroll as executors and trustees, and Norman F. Codo as an attorney for said estate and, in addition, privileged by the representation of two additional attorneys (Mr. Thomas Moran & Mr. Alexander Bond) in the State of Illinois as shown in Exhibit (6) Petition from the Defendants to have their Acts discharged up to 10/30/75 in the Fourth Accounting and to which the plaintiff objects, and in addition, the present New York law firm, Hall, Dickler, Lawler, Kent & Howley, representing them in the State of New York, where the plaintiff has no steady income being a free-lance writer, cut off from her resources guaranteed by her father's Will, undergoing the pressures and worries of financial insecurity.

In the Hanson v. Denkla case, the extra-territorial

jurisdiction of a non-resident trustee in a will contest involving trust assets, not located in the forum state, was denied because the defendant trustee did not have minimal contact with Florida, the forum state.

In plaintiff's case, the executors and trustees violated the Will by not having the same minimal contact required, thereby failing in the execution of the Will. Would the executors and trustees have executed the Will of Patrick D. Fahey in accordance with his expressed terms, the minimal contact would be in this instance maximum contact in the State, since the plaintiff has resided in the State of New York since 1959. The persistent course of conduct of the executor or administrator or agent, as per C.P.L.R.302(a)(3)(i) in the State becomes in this case the persistent course of conduct of these executors and administrators by not having a minimal contact in the State, since as hereabove mentioned, it is obvious that these executors and trustees did not execute any writing under the Will or outside of the Will with the plaintiff in New York to insure that there would be no minimal contact whatsoever with the State of New York.

Except for Exhibits (2), (3), (4), & (5), which substantiate the omissions committed by the defendants with full knowledge of the consequences and damages (Appendix E, pg. 24, sub. (b), (c), (d), (e)) that the plaintiff would be subject to and suffer throughout these past five years through

deprivation of her rightful resources from the omissions of the defendants which in plaintiff's case falls within C.P.L.R. 302 (a)(3)(i), (Appendix C, pg.13) as well as C.P.L.R. 302 (a)(2) (Appendix G. pg.36).

In Singer V. Walker (cite as 261 N.Y.S. 2d), we find that the jurisdiction of a non-domiciliary tort-feasor was held in the New York Court - Appelate Division. The complaint alleged that a resident of this State was injured when a geologist hammer that he was using in Connecticut broke. The hammer was manufactured in Illinois by a corporation not doing business in this State. The hammer was shipped by the manufacturer from Illinois to the dealer in New York City. That action was brought by service of the summons and complaint upon the manufacturer in Illinois and its motion to dismiss the complaint on the grounds that the Court had not acquired personal jurisdiction was granted at special terms since the tortious act complained of did not take place in this State or arise **** of any transaction of business in this State. The Appelate Division, First Department, taking a different view, reversed "on the Law" and denied the motion, holding that the cause of action was one arising from the commission of a tortious act within the State under Paragraph 2 of Sub.(a) of Section 302 even though the act itself was committed out of the State which caused injurious consequences within the State.

In confirming, Chief Judge Desmond stated that,

"the statutory language (302 Subd. (a), Par.2) "commits a tortious act within the State," is taken verbatim from Illinois law (Ill. Rev. Stat. ch. 100 § 17). It has the same meaning as the phrase "tortious conduct" in the Connecticut and North Carolina statute and "part of a tort" in the Minnesota, Texas, Vermont, and West Virginia laws. All reflect the idea that various separate acts or omissions may together make out a tort. Referring to the Minnesota, Texas, Vermont statute, Chief Judge Desmond referred that the holding to such a statute based on the commission within the State of the "tort in whole or in part" is sufficiently broad to confer jurisdiction in a case involving an out of state tortious act which results in injurious consequences within the State.

In plaintiff's case, the omissions of the acts of the executors and trustees in Illinois to execute the Will of the deceased according to its expressed terms constitutes also a persistent tortious conduct that carried its effect into the State of New York for the past five years.

Plaintiff must stress the point that in plaintiff's case, the defendants are executors and trustees and obviously their function is not one of manufacturers of products as in the Singer v. Walker case, but nevertheless, their function is included in C.P.L.R. 302 (a), "Acts which are the basis of jurisdiction. As to a cause of action arising from any of

of the acts enumerated in this section, a court may exercise personal jurisdiction over non-domiciliary executors or administrators, who in person or through an agent:".

Certainly the obvious actions of an executor, trustee, or administrator in C.P.L.R. 302 to be considered tortious would be the omissions or actions of non executing the Will accordingly to the terms of the decedent's Will and in plaintiff's case, it is exactly what these executors, trustees, or administrators have done. If not, what is then to be considered the course of conduct of said administrators or executors in C.P.L.R. 302 ? In the pure sense of the issue, their course of conduct has to be the execution of the last Will and Testament of the decedent according to its terms beyond any doubt.

For these reasons, the decisions and judgment in the Hanson v. Denkla case cannot be fairly be applied to this case. Although a Constitutional question was included, there was no tortious act, which act in plaintiff's case, violated plaintiff's civil rights, protected by Section 1983, 1985, & 1988 of Title 42, U.S.C. and by the Federal Constitution.

In the Smith Ellington case, the personal service was served upon the Secretary of Tennessee, who was shown not to be the defendant's agent. In plaintiff's case, the Federal Marshall did serve the right persons.

In the Mutual Insurance Company v. Maxwell, again

the service of summons and complaint to the Secretary of Tennessee (Smith Ellington case), is confirmed that there was nothing in the record to support a finding that the Secretary of State of Tennessee was authorized to accept service for the named defendants. Again, in plaintiff's case, the right persons were served.

To continue, Section 1988 of Title 42 U.S.C. indeed does not provide for nationwide service of process in any action under the Civil Rights Act, since plaintiff agrees that Section 1988 of Title 42 for the vindication of individual rights does not provide for the execution of jurisdiction but it does provide for the means to execute. That is, Section 1988 of Title 42 is the means to provide for the means to execute. In addition, the affidavit of defendant Maxwell remained uncontested where in plaintiff's case the affidavit of the defendants (Appendix B, pg. 7) has been contested by the plaintiff's affidavit (Appendix F, pg. 28), making plaintiff's affidavit uncontested.

In all three cases, the two issues comprehended in the plaintiff's complaint and memoranda, now the Appendix, are independent of each other. In the Hanson v. Denkla case and in the Safeguard Mutual Insurance Company v. Maxwell, there was no tortious act alleged and in the Smith v. Ellington case, the 14th Amendment (1) appropriated to the property rights was not considered. In plaintiff's case, we have a

violation where the assets at this point have no forum state and a violation of the Civil Rights Act, which violation violates plaintiff's civil rights, deriving from the rights to personal property and pursuit of happiness and that of a tortious act.

Chapter XXII of the Forty-Second Congress, Sess. I, reads, "An act to enforce the provision of the Fourteenth Amendment to the Constitution of the United States, and for other purposes."

"Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, shall subject or cause to be subjected any persons within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, customs, or usage of the State, to the contrary notwithstanding be liable to the party injured in any action at law, suit in equity and other proper proceedings..... and other remedies provided in like cases in such courts, under the provision of the Act of the 9th of April, 1866, entitled, "An Act to Protect All Persons in the United States in their Civil Rights, and To Furnish the Means of their Vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

In Section 3 of the Act of April 9th, 1866, "And be it further enacted, That the district court of the United States.....The jurisdiction in civil and criminal matters hereby conferred on the district courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adopted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of the cause, civil or criminal, is held so far as the same is not inconsistent with the Constitution and laws of the United States shall be extended to and govern said courts in the trial and deposition of such cause....."

Thereby Section 6 and 8 and the Act of May 31, 1870 continues to support the preceded act of the 9th of April, 1866, which in turn is supported by the Act of April 20, 1871.

Therefore, in any civil rights action, Section 1983, 1985, through 1988, of Title 42, deriving from the abovementioned statutes are provided for their disposition and execution of the matter when not inconsistent with the Constitution of the United States and the Constitution and Statutes of the States.

Rule 4(f) of the F.R.C.P., goverened by the same principle and statutes, has to submit to Rule 4(e) whereby "whenever a Statute of the United States provides for service of a summons.....upon a party not an inhabitant of or found within the State in which the district court is held, service may be made under the circumstances and in the manner prescribed by the Statute or, if there is no provision therein prescribing the manner of service in a manner stated in this rule." That is, Rule 4. In addition, there is also Rule 4(h) Amendment, "At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended...."

As a further consideration, plaintiff will quote Mr. Justice Black in Hanson v. Denkla when he said, "In the course of this evolution, the old jurisdictional landmarks have been left far behind so that in many instances States may now properly exercise jurisdiction over non-residents not unable to service within their borders. Yet further relaxation seems certain."

Furthermore, in addition to the previous issues, the plaintiff, as named executor, under Paragraph Fifth and Sixth of the Will, is also subjected to future tax liability. As a named executor, should the two executors fail or cease in their function as such not being able to recover from the recepient of those properties for certain Federal Estate Tax Return (one of the other sources, excluded from the

residual estate but included in the Will), properties over which the decedent has power of appointment, the plaintiff, as a single executor, will have to reimburse the tax due, for said properties.

As defined in the 56th Statute, 77th Congress, Second Session, Chap. 619, page - 942 & 943, the meaning of the definition of "power of appointment" and its function becomes clear and without question.

Section 403 of said Statute, Sub. 2, it is written: "(2) Definition Of Power of Appointment -- For the purposes of this subsection the term "power of appointment" means any power to appoint exercisable by the decedent either alone or in conjunction with any person, except

"(A) a power to appoint within a class which does not include any others than the spouse of the decedent, spouse of the creator of the power, descendants of the decedent or his spouse, descendants (other than the decedent) of the creator of the power of his spouse, spouses of such descendants, donees described in section 812 (d), and donees described in section 861 (a) (3). As used in this subparagraph, the term 'descendant' includes adopted and illegitimate descendants, and the term 'spouse' includes former spouse: and

"(B) a power to appoint within a restricted class if the decedent did not receive any beneficial interest, vested or contingent, in the property from the creator of the

power or thereafter acquire any such interest, and if the power is not exercisable to any extent for the benefit of the decedent, his estate, his creditors, or the creditors of his estate.

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"(d) Liability Of Recipient Of Property Over Which Decedent Had Power Of Appointment.-- Unless the decedent directs otherwise in his will, if any part of the gross estate upon which the tax has been paid consists of the value of property included in the gross estate under section 811 (f), the executor shall be entitled to recover from the person receiving such property by reason of the exercise, nonexercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the sum of the net estate and the amount of the exemption allowed in computing the net estate, determined under section 935 (c), or section 861, as the case may be.

Section 2205. Reimbursement out of estate(Title 26, U.S.C.) If the tax or any part thereof is paid by, or collected out of, that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose

interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. Aug.16, 1954, c.736,68A Stat.402.

It is to note that in plaintiff's case, the life insurance of the decedent of which his spouse is a beneficiary is not included in this property over which the decedent has power of appointment since in same Paragraph SIXTH A of the Will, the decedent waives his rights to recover from any person, including the beneficiary of his life insurance, which in this case, happens to be the spouse, also one of the executors and trustees of the estate, except by the recepient of the previously mentioned properties, the recepient of which property is of course not the spouse.

Of course the jurfsdiction over these defendants is determined by the actions of said defendants, as executors, trustees, or administrators in their violations and in the Will which for that matter and purpose should it be necessary, the various instruments of power, which were submitted together with the Estate Form 706, the decedent's Federal Estate Tax Return at the Internal Revenue Service, Department of the Treasury, Midwest Region will eliminate any possible future questions to the effect.

Considering all the events and the acts of these defendants, disregarding all of which the decedent really intended to be, especially in relation to the plaintiff, who, thanks to his care and interest, was able to graduate from Bryn Mawr College in 1957, and continued her graduate studies at St. Hilda's College, Oxford University, England, Johns Hopkins University at Baltimore and Wharton School of Business in Philadelphia, and has been published in six different national magazines and newspapers, including as Editorial in the WALL STREET JOURNAL, the plaintiff has had to stop her commitment to the intellectual growth that her father sponsored and encouraged. To a greater length the plaintiff need not to go in search of similar cases to show clearly that jurisdiction to these defendants would not be for the protection of their constitutional rights as non-residents, but would give furtherance to the violation committed to the plaintiff's rights, which have so clearly been stated, since the plaintiff has no means, financial or otherwise, to go to Illinois. That the residence and jurisdiction must be determined by the circumstances and all actions by the defendants for the protection of plaintiff's constitutional rights.

The defendants have not answered the complaint (App.F, pg. 28) which was served upon them under the allegation of jurisdiction of a federal question, and the defendants have ignored that question by calling lack of jurisdiction over the

person. The plaintiff respectfully turns to this Court to have the defendants answer plaintiff's complaint and affidavit and that the Estate Form 706 (Appendix F, sub. (d), pg. 28 & 29) filed in 1971 with the Department of Treasury, Internal Revenue Service of the Midwest Region, together with all certified letters of administration and all testamentary letters, which filing falls exclusively within the federal jurisdiction, be rendered to the court and to the plaintiff as her right being also a named executor and trustee under the Will to exercise all powers and discretions, in each case without court order, as determined by plaintiff's deceased father's Last Will and terms.

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